85-477

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner-Appellant

v.

HERCULES INCORPORATED,
Respondent-Appellee

and

GOULD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1159

PHILADELPHIA ELECTRIC COMPANY

v.

HERCULES, INC.

and

GOULD, INC.,

Hercules, Inc., Appellant

Appeal From the United States
District Court for the
Eastern District of Pennsylvania
D.C. Civ. No. 82-0690

Argued: December 14, 1984

Before: GARTH and HIGGINBOTHAM,
Circuit Judges, and
McCUNE, *District Judge**

(Filed May 28, 1985)

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*Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is an appeal from a final judgment of the district court in favor of Philadelphia Electric Company ("PECO") and against Hercules, Inc. ("Hercules") in the amount of $394,910.14, and further ordering Hercules to take all appropriate action to eliminate pollution on a property owned by PECO in Chester, Pennsylvania. The case was tried to a jury on theories of public and private nuisance. For the reasons set forth in the opinion that follows, we will reverse the judgment against Hercules on PECO's claims, and vacate the injunction.

I.

Prior to October of 1971, the Pennsylvania Industrial Chemical Corporation ("PICCO") owned a tract of land abutting the Delaware River in Chester, Pennsylvania where it operated a hydrocarbon resin manufacturing plant. At the time PICCO acquired the property ("the Chester site") there was an inlet located at the southern end that opened into the Delaware River. Sometime later PICCO filled in the shoreline at the inlet and thereby created a lake ("the PICCO pond"). During the period it conducted operations on the Chester site, the evidence tended to show, PICCO deposited or buried various resins and their by-products in the PICCO pond and possibly other locations.

In 1971 PICCO ceased operations on the Chester site and sold the facility to Gould, Inc. ("Gould"). Gould did not conduct any operations on the Chester site, other than leasing certain tanks to ABM Disposal Services Company ("ABM"), which used them to store large quantities of various waste materials, though apparently not resins or resinous by-products.

In mid-1973, PECO -- which operated a plant on an adjoining piece of land -- obtained an option to purchase the Chester site from Gould. Prior to exercising its option, a PECO representative inspected the site on more than one occasion, including walking tours along the banks of the Delaware River and the banks of the PICCO pond. PECO learned that Gould's tenant, ABM, had caused a number of spills on the site, including oil spills in the pond area, and was informed that ABM was a "sloppy tenant". ABM was unable to clean up the Chester site in time to meet Gould's original deadline for vacating the premises, a condition of the PECO purchase agreement. PECO exercised its option and acquired the property in March of 1974. PECO has conducted no operations on the Chester

site, but has leased a portion of the land to American Refining Group, Inc.

In 1980 the Pennsylvania Department of Environmental Resources ("DER") discovered that resinous materials similar to those once produced by PICCO were seeping from the banks of the Delaware River at the Chester site, and that the PICCO pond was contaminated with the same material. On August 22, 1980 PECO received the following letter from a DER Water Quality Specialist:

> This is to confirm the results of an inspection conducted on July 15, 1980 . . . which revealed that a resinous material was leaching from the bank of the Delaware River from PECO property located between Jeffrey and Ward Streets.
>
> Such condition is in violation of Title 25, Chapter 101, Section 2 of the Rules and Regulations of the Department of Environmental Resources regarding Special Water Pollution Regulations.[1]
>
> During our preliminary survey of the site you stated that the property was once owned by Pennsylvania Industrial Chemical Company which operated a resin disposal lagoon on site. You mentioned that core samples had been taken of this site, that the contents of the lagoon had been pumped to a storage tank and samples of this material were being analyzed. In order that we may evaluate the impact of this material on the Delaware River we request that a copy of the core sampling results and a copy of chemical analysis of the substance be submitted to the Department. If the core sampling does not provide sufficient data, additional monitoring may be required.

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1. These are regulations promulgated pursuant to authority granted by the Pennsylvania Clean Streams Law, 35 Pa. Cons. Stat. Ann. § 691.5 (Purdon Supp. 1983).

> It was also noted that a remnant of the resin lagoon remains on site. During our inspection you indicated that this lagoon was going to be cleaned out and abandoned. Please indicate how and when this work will be accomplished.

In response, PECO developed a plan whereby the remaining pond resin would be removed to a land fill, and the PICCO pond area would be backfilled and regraded. DER approved this plan on November 21, 1980. PECO produced evidence indicating that it incurred expenses of $338,328.69 in implementing the clean-up, and an additional $7,578 in collecting and carting away resinous material that continued to leach to the surface at various places around the Chester site during the summers of 1981-1983. PECO also introduced evidence of $67,500 in lost rentals from American Refining due to the continuing leaching.

In a letter dated March 10, 1981, DER expressed satisfaction with the clean-up of the pond area, but reported that a February 27, 1981 inspection revealed resins still on the Delaware River bank and continued leaching of resins into the River. PECO was asked to "submit in writing . . . Philadelphia Electric's position on the control or clean-up of the resin material remaining on the bank." After PECO expressed reluctance to spend any additional money on clean-up of the Chester site, DER wrote PECO again, on May 28, 1981:

> Leachate analysis of the resin on the river bank indicates that there is a leaching problem from the resin. Such discharge constitutes an unpermitted discharge to the waters of the Commonwealth and is a violation of the Clean Streams Law, subject to the penalties provided therein. It is therefore required that the resin material on the river bank be removed.

The record does not reveal that DER or PECO has taken any further action regarding the resinous material on the river bank, and PECO's witness testified at trial that the condition still existed.

On February 16, 1982, PECO instituted suit against Gould and Hercules, which had acquired the remaining assets of PICCO in 1973, in exchange for Hercules stock. (PICCO was dissolved on January 9, 1976.) Hercules cross-claimed against Gould. On cross-motions for summary judgment the district court ruled that Hercules was liable as PICCO's corporate successor under the express terms of the Agreement and Plan of Reorganization ("the Agreement") it entered into with PICCO, and because the transaction was a *de facto* merger. A jury trial was held in July of 1983. PECO, stating that discovery had shown no wrongdoing on the part of Gould, offered no evidence against Gould.[2] At trial Hercules attempted to show that the pollution was not consistent with PICCO's operations on the Chester site, but was consistent with the operations of ABM and other industrial plants in the area. At the close of evidence, the jury was instructed on principles of public and private nuisance. The jury's verdict was rendered in the form of answers to special interrogatories:

1. Do you find by a preponderance of the evidence tht PICCO caused the contamination of the property now owned by Philadelphia Electric Company? YES.

2. Do you find by a preponderance of the evidence that the contamination on the property now

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2. After trial PECO revealed that it had actually released Gould from liability in consideration of $5,000. Though we do not approve of this lack of candor, we do not believe that Hercules was prejudiced or that reversal is required on this ground.

owned by Philadelphia Electric Company continues to pollute the groundwater or the Delaware River? YES.

3. In what amount do you award damages? $345,906.69.

4. Do you find by a preponderance of the evidence that ABM's activities contributed to the contamination of the Philadelphia Electric Company property? YES.

5. Was Gould aware of ABM's activities and permitted them to continue? NO.

Based on these answers, the district court moulded a verdict and entered judgment for PECO against Hercules in the amount of $394,910.14, which included delay damages of $49,003.45 pursuant to Pennsylvania Rule of Civil Procedure 238, entered judgment for Gould on Hercules' cross-claim, and issued an injunction as follows:

> IT IS FURTHER ORDERED and DECREED that Hercules, Inc. shall forthwith take all appropriate action to abate and eliminate the contamination on the property of the Philadelphia Electric Company located at the Chester site and abate the further pollution of the groundwater and the Delaware River adjacent to the property by collecting and removing all pollutants in accordance with all applicable rules and regulations of the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, and any other appropriate state or federal regulatory agency.

In this appeal Hercules contends, *inter alia*, that the district court erred in ruling that it was liable as PICCO's successor, and that PECO had no cause of action against it for public or private nuisance. The

parties are agreed that the substantive law of Pennsylvania governs this diversity case.

II.

"As a general rule," under Pennsylvania common law, "when one company sells or transfers all its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets." *McClinton v. Rockford Punch Press & Manufacturing Company*, 549 F. Supp. 835, 837 (E.D. Pa. 1982). Four exceptions to the general rule of nonliability are widely recognized, in Pennsylvania and elsewhere. Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation or *de facto* merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be held responsible for the debts and liabilities of its predecessor. *See Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971); *Granthum v. Textile Machine Works*, 230 Pa. Super. 199, 326 A.2d 449 (1974). *See generally* 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7122 (rev. perm. ed. 1983). "A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor." *Husak v. Berkel, Inc.*, 234 Pa. Super. 452, 457, 341 A.2d 174, 176 (1975). In addition, Pennsylvania has recently adopted the more controversial "product-line" exception in products liability cases. *See Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981); *Savini v. Kent Machine Works*, 525 F. Supp. 711 (E.D. Pa. 1981). *See generally* Comment,

Expanding the Products Liability of Successor Corporations, 27 Hast. L. Rev. 1305 (1976). In the instant case the district court found, as a matter of law, that Hercules had expressly assumed PICCO's liabilities and that the transaction amounted to a *de facto* merger. We agree with the district court as to both theories of successor liability.

A. *Express Assumption of Liability*

Article IV, paragraph 4.1 (iii) of the Agreement provided for:

> [t]he assumption by Hercules of all the debts, obligations and liabilities of Picco as of the Closing Date, excepting therefrom the liabilities arising out of the breach of any warranty of Picco contained herein, in any certificate or other instrument furnished hereunder, any misrepresentation by Picco herein, or the failure of Picco to perform under any of its agreements and contracts herein, and except liabilities of Picco set forth in subsection (iv) for which cash is specifically reserved herein.

As the district court noted, under this language Hercules broadly assumed *all* liabilitites incurred by Picco as of the closing date, subject to a few limited exceptions. In such cases, it is of no consequence that the specific liability at issue is not enumerated. *See Bouton v. Litton Industries*, 423 F.2d 643 (3d Cir. 1970); *Bippus v. Norton Company* , 437 F. Supp. 104 (E.D. Pa. 1977). Unless this liability comes within one of the express exceptions, Hercules may be held to have assumed it.

Hercules seeks to avoid this result by juxtaposing the exception for "liabilities arising out of the breach of any warranty of Picco" with Picco's warranty, in article I, paragraph 1.4 of the Agreement, that "at the date

hereof Picco has no material liabilities, contingent or otherwise, not reflected in the Picco Balance Sheet, not otherwise herein disclosed, and all such financial statements have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved." Hercules contends that in light of this warranty, it is apparent that it did not assume liabilities, such as the one at issue, that were contingent or unknown at the closing date. We find this contention unpersuasive. As we read the exception for liabilities arising out of breach of warranty by PICCO, it would seem to preserve the rights of Hercules as against PICCO in the event of a breach; it does not pertain to the rights of injured third parties.[3] Moreover, we doubt that there is a breach of the warranty here. Because, as Hercules concedes, the liability was unknown as of the date of the Agreement, PICCO could not have been responsible for disclosing it. *Cf. Bouton v. Litton Industries*, 423 F.2d at 652.

Our conclusion that Hercules' assumption of liability did not exclude liabilities that were unknown or contingent is bolstered by a comparison of the language employed here with that used in cases where such liabilities were deemed to be excluded. In *Lopata v. Bemis Company*, 383 F. Supp. 342 (E.D. Pa. 1974), *vacated*, 517 F.2d 1398 (3d Cir.), *judgment reinstated*, 406 F. Supp. 521 (1975), *aff'd*, 546 F.2d 417 (1976), the agreement at issue provided that the purchaser of the assets "shall not assume any liabilities of the seller nor take the assets subject to any liabilities whether fixed or contingent, known or unknown," except as specifically provided. *Id.* at 344.

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3. *See* Carlin v. Pennsylvania Power and Light Co., 363 Pa. 543, 545, 70 A.2d 349, 351 (1950) ("The cause of action owned by the plaintiff is distinct from the cause of action arising out of the duty of the additional defendant to idemnify the defendant.").

In *McCullough v. National Bank of Union City* , 127 Pa. Super. 452, 193 A. 65 (1937), the defendant bank purchased the assets of a closed bank and assumed responsibility for 60% of its "known, existing liabilities." In *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977) the purchaser assumed "all debts, obligations, contracts and liabilities of [the transferor] of any kind, character or description, whether accrued, absolute, contingent or otherwise, as reflected on the balance sheets, books of account and other records of [the transferor] on the date hereof." 565 F.2d at 446. This language was deemed to exclude unknown liabilities. In light of the clear and specific language that has been used to effect the exclusion of unknown or contingent liabilities in other cases, we must decline to follow Hercules' rather strained interpretation of the Agreement at issue. We conclude that Hercules has assumed any liability PICCO may have had due to pollution of the Chester site.

B. *De Facto Merger*

Judge McGlynn's excellent discussion of this theory of successor liability is worth setting out in full:

> As previously noted, the Hercules-PICCO agreement was entitled an Agreement and Plan of Reorganization. However, because of the complex nature of corporate reorganizations and acquisitions the intrinsic nature of a transaction cannot be ascertained merely from the form by which it is structured. It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent. *Knapp v. North American Rockwell Corp.* , 506 F.2d 361 (3d Cir. 1974) (Rosenn, J., concurring), *cert. denied* 421 U.S. 965, 95 S.Ct. 1955, 44 L.Ed. 2d 452 (1975).

In determining whether a particular transaction amounts to a de facto merger as distinguished from an ordinary purchase and sale of assets most courts look to the following factors:

(1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing coporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

See e.g., Shannon v. Samuel Langston Company, 379 F. Supp. 797, 801 (W.D. Mich. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98, 103-105 [(Law Div. 1970)], *aff'd*, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972); *See also Knapp*, 506 F.2d at 365.

In *Knapp*, the plaintiff was injured in 1969 when his hand was caught in a machine that had been designed and manufactured by Textile Machine Works, (TMW) and sold to plaintiff's employer in 1966 or 1967. 506 F.2d at [362]. In April of 1968,

eighteen months prior to plaintiff's injuries, TMW entered into an agreement with North American Rockwell Corp., (Rockwell) whereby Rockwell acquired substantially all of the assets and liabilities of TMW in exchange for Rockwell stock. The agreement also stipulated that TMW was to dissolve as soon as possible. *Id.* at 363. Knapp brought his action against Rockwell in 1971 alleging his injuries resulted from the negligence of TMW in designing and manufacturing the machine and that Rockwell, as TMW's successor, was liable for such injuries. The transaction between TMW and Rockwell was characterized as a sale of assets. *Id.* at [362-63].

In reversing the district court's award of summary judgment in favor of Rockwell, the Court of Appeals held that, for the purposes of determining liability for tortiously injured parties, the Rockwell-TMW transaction should be treated as a de facto merger thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to the transaction. *Id.* at 367.

While cognizant of the general rule of nonliability for a corporation which merely purchases another's assets, the *Knapp* court nevertheless looked beyond the form of the transaction. In doing so the court enumerated several factors as indicia of a de facto merger: the exchange of substantially all of TMW's assets and liabilities for Rockwell stock; the nominal amount of cash which Rockwell left with TMW to cover the expenses of the transfer with the proviso that any funds remaining after dissolution was [sic] to be returned to Rockwell; and finally, the requirement that TMW was to distribute the Rockwell stock to its

shareholders and dissolve as soon as practicable. *Id.* at 363.

> The factors which the *Knapp* court focused on in imposing liability on the successor corporation are likewise present here. The Hercules-PICCO agreement provided that Hercules was to acquire all the assets and substantially all of the liabilities of PICCO in exchange for Hercules stock; PICCO was to use its best efforts to keep its business organization intact, to keep available to Hercules the service of its present employees and to maintain its relationship with its customers and suppliers for Hercules' benefit; PICCO's management and personnel became a part of Hercules; PICCO was required, to the extent permitted by law, to transfer to Hercules the right to use its corporate name; PICCO was left with a nominal amount of money to dispose of its expenses in connection with the transaction and any money remaining was to be returned to Hercules; PICCO was required to dissolve as soon as practicable; and finally, following closing, Hercules continued to operate the PICCO plants, produce the same PICCO products and represented to PICCO's customers that PICCO resins had became a part of Hercules' Organics Department.

Philadelphia Electric Co. v. Hercules, Inc., 587 F. Supp. 144, 151-152 (E.D. Pa. 1984) (footnote omitted).

There is little that we can add to Judge McGlynn's thoughtful analysis and we adopt it as our own. Indeed, Hercules does not argue that the district court misapprehended or misapplied the elements of a *de facto* merger. Rather, Hercules argues that the district court erred in assuming that the Pennsylvania courts

would apply this doctrine in an environmental nuisance case. Hercules cites *Dawejko v. Jorgensen Steel Co., supra*, for the proposition that the Pennsylvania courts, in determining whether successor liability is appropriate, will first look to see whether the same social policy considerations underlying strict products liability are thereby promoted. Since these policies would not be promoted by imposing successor liability here, it is argued, the *de facto* merger doctrine should not be applied. Hercules' contention is entirely without merit. In *Dawejko*, the Pennsylvania Superior Court adopted a new exception to the general rule of nonliability -- the so-called "product-line" exception -- that applies *only* in products liability cases. Not surprisingly the court did consider whether the policies of strict products liability would be promoted by adopting the product-line exception, but the court made it quite clear that it was *expanding* the reach of successor liability, and not in any way limiting the scope of established exceptions:

> One may retain the traditional exceptions but expand their boundaries, so that "merger" or "continuation" are held to include cases they once would not have included. Or one may adopt a new exception, such as the product-line exception. We believe it better to adopt a new exception. . . . By adopting a new exception . . . the other exceptions then remaining, to deal with cases not so much affected by the policy considerations that have led to the rule of strict liability for defective products.

290 Pa. Super. at 25-26, 434 A.2d at 111. We believe that the *de facto* merger doctrine is supported by "social policy considerations" independent of any particular cause of action, *see In re Penn Central Securities Litigation*, 367 F. Supp. 1158, 1170 (E.D.

Pa. 1973) ("The *de facto* merger doctrine is a judge-made device for avoiding patent injustice which might befall a party simply because a merger has been called something else."), and that the Pennsylvania courts would apply it in a wide variety of cases, including this one. *See generally Farris v. Glen Alden Corp.*, 393 Pa. 427, 432, 143 A.2d 25, 28 (1958); 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 7122-7123.5 (rev. perm. ed. 1983).

III.

Having determined that Hercules may be liable as PICCO's successor for unknown and contingent liabilities, we must analyze the relationship between Hercules and PECO as that of a vendor and remote vendee of land. Hercules argues that this relationship is governed by the rule of *caveat emptor*, subject to limited exceptions not applicable here, and that a vendee has no cause of action against a vendor sounding in private nuisance for conditions existing on the land transferred. After carefully considering this question of first impression, we are persuaded that under Pennsylvania law Hercules cannot, as a matter of law, be held liable to PECO on a private nuisance theory. The Reporter's Note to *Restatement (Second) of Torts* § 352 (1965) sums up the prevailing view regarding the liability of a vendor of land:

> Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has

> been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.

See also M. Friedman, *Contracts and Conveyances of Real Property* § 1.2(n), at 37 (4th ed. 1984) ("[I]n the sale of realty this doctrine [*caveat emptor*] not only applies, it flourishes.").

As the Pennsylvania Supreme Court has said: "Generally speaking, the rule is that in the absence of fraud or mispresentation a vendor is responsible for the quality of property being sold by him only to the extent for which he expressly agrees to be responsible. . . . The theory of the doctrine is that the buyer and seller deal at arm's length, each with an equal means of knowledge concerning the subject of the sale, and that therefore the buyer should be afforded only those protections for which he specifically contracts." *Elderkin v. Gaster*, 447 Pa. 118, 124, 288 A.2d 771, 774-75 (1972) (footnote omitted). In *Elderkin* the court abolished the rule of *caveat emptor* as to the sale of new homes by a builder-vendor and, in accordance with a national trend, adopted a theory of implied warranties. *See generally* 6A *Powell on Real Property* chap. 84A (1984). But the reasoning of the *Elderkin* opinion[4] leaves us with no doubt that where, as here, corporations of roughly equal resources contract for

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4. *Elderkin*, like other decisions adopting implied warranty theories, is based on the theory that as between the builder-vendor and the home buyer, the builder-vendor is in by far the better position in terms of expertise and bargaining power. We find no reason to assume such a disparity exists in the instant case.

the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure,[5] *caveat emptor* remains the rule.

A number of general exceptions to the rule of *caveat emptor*, mostly dealing with liability for personal injuries or property damage resulting from latent dangerous conditions, have been recognized. *See Quashnock v. Frost*, 299 Pa. Super. 9, 445 A.2d 121 (1982); *Shane v. Hoffmann*, 227 Pa. Super. 176, 324 A.2d 532 (1974); *Restatement (Second) of Torts* § 353; Annot., 18 A.L.R.4th 1168 (1982); Annot., 48 A.L.R.3d 1027 (1973). PECO concedes that these exceptions do not apply in this case. (Indeed, PECO appears to argue that because the exceptions do not apply, neither does the rule. This, of course, does not follow.) PECO's tack has been to cast its cause of action for the condition of the Chester site as one for private nuisance. We, however, do not believe that PECO can escape the rule of *caveat emptor* by this route.

Restatement (Second) of Torts § 821D defines a "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." The briefs and arguments, as well as the district court's opinion, 587 F. Supp. at 152-54, give much attention to the questions of whether the condition created by Hercules on the Chester site amounted to a nuisance, and whether Hercules remains liable for the nuisance even after vacating the land. For the purposes of our decision, we may assume that Hercules created a nuisance, and that it remains liable for this condition. See *Restatement (Second) of Torts* §840A. The crucial

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5. Compare those cases holding that there are no implied warranties in the sale of unimproved land. Conklin v. Hurley, 428 So.2d 654 (Fla. 1983); Witty v. Schramm, 62 Ill. App. 3d 185, 379 N.E.2d 333 (1978); Cook v. Salishan Properties, 279 Or. 333, 569 P.2d 1033 (1977); Jackson v. River Pines, Inc., 276 S.C. 29, 274 S.E.2d 912 (1981).

and difficult question for us is *to whom* Hercules may be liable.

The parties have cited no case from Pennsylvania or any other jurisdiction, and we have found none, that permits a purchaser of real property to recover from the seller on a private nuisance theory for conditions existing on the very land transferred, and thereby to circumvent limitations on vendor liability inherent in the rule of *caveat emptor*. In a somewhat analogous circumstance, courts have not permitted *tenants* to circumvent traditional limitations on the liability of *lessors* by the expedient of casting their cause of action for defective conditions existing on premises (over which they have assumed control) as one for private nuisance. *See Collette v. Piela*, 141 Conn. 382, 106 A.2d 473 (1954); *Clerken v. Cohen*, 315 Ill.App. 222, 42 N.E.2d 846 (1942). In *Harris v. Lewistown Trust Co.*, 326 Pa. 145, 191 A. 34 (1937), *overruled in part on other grounds, Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968), the Supreme Court of Pennsylvania held that the doctrine that a landlord not in possession may be liable for injuries resulting from a "condition amounting to a nuisance" is confined to "the owners or occupants of near-by property, persons temporarily on such property, or persons on a neighboring highway or other places." 326 Pa. at 153, 191 A. at 38.[6] Recovery on this theory was not available to tenants or their invitees: "A breach of duty owed to one class of persons cannot create a cause of action in favor of a person not within the class. A plaintiff must show that as to him there was a breach of duty." 326

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6. *Cf. Restatement (Second) of Torts* § 840A and comment c thereto ("If the vendor or lessor has himself created on the land a condition that results in a nuisance, ... *his responsibility toward those outside of his land* is such that he is not free to terminate his liability to them . . . by passing the land itself on to a third person.") (emphasis added).

Pa. at 152, 191 A. at 38.[7] Similarly, under the doctrine of *caveat emptor* Hercules owed only a limited duty to Gould and, in turn, to PECO. PECO concedes that this duty was not violated. PECO cannot recover in private nuisance for the violation of a duty Hercules may have owed to others -- namely, its neighbors.[8]

We believe that this result is consonant with the historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses. *See Essick v. Shillam*, 347 Pa. 373, 376, 32 A.2d 416, 418 (1943) ("An owner has a right, barring malice and negligence, to any use of his property, unless by its continuous use he prevents *his neighbors* from enjoying the use of their property to their damage.") (emphasis added).[9] All of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to

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7. The limitation on landlord liability that the *Harris* case imposed -- preventing recovery by a lessee injured due to a condition the landlord promised to repair -- was much criticized and eventually overruled by *Rettmeyer*. We believe, however, that insofar as it stands for the proposition that salutary limitations on vendor or lessor liability to vendees and lessees cannot be circumvented by asserting a breach of a duty owed to third parties, *Harris* reflects sound tort theory.

8. The record shows that prior to its purchase of the Chester site, PECO also owned an adjoining piece of land, and thus was a neighbor of Hercules. PECO does not, however, allege that pollution of the Chester site interfered with its use and enjoyment of this adjoining site.

9. *See also* 5 *Powell on Real Property* § 704, at 320 ("The basic criterion in the whole law of private nuisance is reasonableness of conduct. . . . The conclusion of 'unreasonableness' depends then upon liability-inviting conduct of the defendant plus a finding that this conduct violates a protected interest of the *neighbor-plaintiff*.")

achieve efficient and equitable solutions to problems created by *discordant* land uses.[10] In this light nuisance law can be seen as a complement to zoning regulations, *see* Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 Wis. L. Rev. 440, 452 ("[T]he state in nuisance cases is exercising, through the judicial arm, the same basic power of the sovereign that it exercises through the legislative arm in zoning."), and not as an additional type of consumer protection for purchasers of realty. Neighbors, unlike the purchasers of the land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation. The record shows that PECO acted as a sophisticated and responsible purchaser -- inquiring

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(emphasis added); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 Va. L. Rev. 1299, 1319 (1977) ("An interference is not a nuisance unless, among other things, it *substantially* interferes with the use and enjoyment of *neighboring land*.") (emphasis added); 2 F. Pollock & F. Maitland, *The History of English Law* 53 (2d ed. 1911) (Nuisance is caused "by things erected, made, or done *not on the soil possessed by the complainant but on neighboring soil*, ... Law endeavours to protect the person who is seized of land, not merely in the possession of the land, but in the enjoyment of those rights *against his neighbours* which he would be entitled to were he seized under a good title.") (emphasis added).

10. *See generally* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973); Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan. L. Rev. 1075 (1980); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 Va. L. Rev. 1299 (1977); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. Rev. 219 (1978).

into the past use of the Chester site, and inspecting it carefully. We find it inconceivable that the price it offered Gould did not reflect the possibility of environmental risks, even if the exact condition giving rise to this suit was not discovered.

Where, as here, the rule of *caveat emptor* applies, allowing a vendee a cause of action for private nuisance for conditions existing on the land transferred -- where there has been no fraudulent concealment -- would in effect negate the market's allocations of resources and risks, and subject vendors who may have originally sold their land at appropriately discounted prices to unbargained-for liability to remote vendees. To so extend private nuisance beyond its historical role would render it little more than an epithet, "and an epithet does not make out a cause of action." *Miller v. Morse*, 9 A.D.2d 188, 192 N.Y.S.2d 571, 576 (1959). Such an extension of common law doctrine is particularly hazardous in an area, such as environmental pollution, where Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities. We conclude that PECO did not have a cause of action against Hercules sounding in private nuisance.

IV.

The doctrine of public nuisance protects interests quite different from those implicated in actions for private nuisance, and PECO's claim for public nuisance requires separate consideration. Whereas private nuisance requires an invasion of another's interest in the private use and enjoyment of land, a public nuisance is "an unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B(1). An action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property

rights.[11] As William Prosser once wrote:

> There are, then, two and only two kinds of nuisance, which are quite unrelated except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. A private nuisance is narrowly restricted to the invasion of interests in the use and enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed. A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure. Although as in the case of other crimes, the normal remedy is in the hands of the state, a public nuisance may also be a private one, when it interferes with private land. The seeds of confusion were sown when courts began to hold that a tort action would lie even for a purely public nuisance if the plaintiff had suffered "particular damage."

Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966) (footnotes omitted). In analyzing the public nuisance claim, we are not concerned with the happenstance that PECO now occupies the very land PICCO occupied when it allegedly created the condition that has polluted the Delaware River

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11. Thus, commercial fishermen and clam diggers operating in public waters can recover on a public nuisance theory for harm to the waters and marine life caused by oil discharged from a tanker in transit. *See* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973).

waters,[12] or that the continuing source of that pollution is located on that land.[13] The question before us is whether PECO has *standing* to bring an individual action for damages or injunctive relief for interference with a public right.

Restatement (Second) of Torts § 821C(1) provides:

> In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

The same requirements apply to individual plaintiffs seeking injunctive relief. *Restatement (Second) of Torts* § 821C(2); Prosser, *supra*, 52 Va. L. Rev. at 1006. PECO argues that the expense it incurred in cleaning up the offending condition constituted the harm requisite for standing to sue for public nuisance. We disagree. Though pecuniary harm certainly may be harm of a different kind from that suffered by the general public, *see Restatement (Second) of Torts* § 821C comment h,[14] we find in this case no allegation or evidence that PECO suffered this harm "exercising

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12. Though Hercules disputes it, we may assume that the jury could properly have found that the leaching of resins into the Delaware River was a public nuisance and that PECCO was responsible for it.

13. Accordingly, we reject Hercules' contentions that the limitations on private nuisance discussed in Part III, *supra*, apply equally to public nuisance, and that it is improper for a claimant to recover for or seek abatement of public nuisance when the alleged cause of the public nuisance is its own property.

14. It may be that under Pennsylvania law harm of a *magnitude* greater than that suffered by the general public is sufficient to confer standing. *See* Pennsylvania Society for the Prevention of Cruelty to Animals v. Bravo Enterprises,

the right common to the general public that was the subject of interference." The public right that was interfered with was the right to "pure water". *See Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392, 412-13, 319 A.2d 871, 882 (1974); Pa. Const. art. I, § 27. PECO does not allege that it used the waters of the Delaware River itself, or that it was directly harmed in any way by the pollution of those waters. Thus, this is not a case "where an established business made commercial use of the public right with which the defendant interfered." Prosser, *supra*, 52 Va. L. Rev. at 1013-14 (footnote omitted). If PECO -- as a riparian landowner -- had suffered damage to its land or its operations as a result of the pollution of the Delaware, it would possibly have a claim for public nuisance. But the condition of the Chester site was not the *result* of the pollution, it was the *cause* of it. DER required PECO, as owner of the Chester site, to remove the sources of the pollution. PECO has been specially harmed only in the exercise of its private property rights over the Chester site. PECO has suffered no "particular damage" in the exercise of a right common to the general public, and it lacks standing to sue for public nuisance.

V.

PECO argues that even if, as we have now held, it had no cause of action against Hercules for public or

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428 Pa. 350, 360, 237 A.2d 342, 348 (1968). This distinction is not, however, important in the instant case. As the discussion that follows points out, even if PECO has suffered a harm both different in kind and greater in degree than that suffered by the general public, it has not suffered that harm in the exercise of a right common to the general public. *Cf.* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (businesses operating on beach did not have standing to sue for pollution of swimming waters, even though they lost customers as a result.).

private nuisance, insofar as the judgment of the district court assessed damages against Hercules it should be affirmed on common law principles of indemnification. The short answer to PECO's contention is that under Pennsylvania law a cause of action for indemnity between jointly liable defendants and a plaintiff's cause of action for the underlying wrong are entirely distinct, *see Carlin v. Pennsylvania Power and Light Company*, 363 Pa. 543, 70 A.2d 349 (1950), and as an appellate court we should be chary of upholding a judgment on the basis of a *cause of action* that was neither pleaded, proved, nor submitted to the jury by the district court. Perhaps this would be possible were there a complete identity of factual issues,[15] but a brief review of the principles of indemnification show that such is not the case here.

Under Pennsylvania law, the right to indemnity "enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation to pay damages occasioned by the negligence of another." *Burbage v. Boiler Engineering & Supply Company*, 433 Pa. 319, 326, 249 A.2d 563, 567 (1969). Under a threat of legal action by the DER pursuant to the Pennsylvania Clean Streams Law, PECO negotiated and carried out a plan to clean up the Chester site. (The jury's verdict against Hercules reflected the cost PECO incurred in implementing the clean-up.) PECO was not, however, required to fight DER to a final judgment in order to be eligible for

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15. "An appellate court may affirm a result reached by the district court on different reasons, *as long as the record supports the judgment*." Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1145 n.1 (3d Cir. 1983) (emphasis added). Where, as here, a case is tried before a jury under one cause of action, it seems most unlikely that the record could support affirmance of a judgment for the plaintiff on the basis of an entirely distinct cause of action.

indemnity. It is not penalized for acting responsibly. "To recover indemnity where there has been such a voluntary payment, however, it must appear that the party paying was *himself legally liable* and could have been compelled to satisfy the claim." *Tugboat Indian Company v. A/S Ivarans Rederi*, 334 Pa. 15, 21, 5 A.2d 153, 156 (1939)(emphasis in original).[16]

"Thus, the indemnitee may be required to establish his case against the indemnitor in the same way that the claimant against him would have been obligated to do, namely, by a preponderance of the evidence. A mere showing by a party seeking indemnity that there was a reasonable possibility that it might have been held liable if it had not settled . . . is not sufficient to recover indemnity; actual legal liability must be shown." 41 Am. Jur. 2d *Indemnity* § 33, at 723 (1968) (footnotes omitted). *See also Martinique Shoes v. New York Progressive Wood Heel Company*, 207 Pa. Super. 404, 217 A.2d 781 (1966). The issue of liability, of PECO or Hercules, under the Clean Streams Law pursuant to which the DER purported to act,[17] has

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16. It is further required that the party seeking indemnity give "proper notice" and "establish that the settlement was fair and reasonable." *Id.* Hercules has not disputed that it was informed of PECO's negotiations with DER, and that the amounts PECO expended in cleaning up the Chester site were reasonable

17. The Clean Streams law provides that "[n]o person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department [DER] or such person or municipality has first obtained a permit from the department. . . . A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance." 35 Pa. Cons. Stat. Ann. § 691.307 (Purdon Supp. 1983).

not been tried. Though the Clean Streams Law declares that all violations are nuisances, that does not mean that all public nuisances give rise to liability under this statute. The jury has not been instructed as to the elements of such liability[18] and its answers to the special interrogatories cannot be transmuted into findings on this issue.[19] Thus, we cannot on the basis

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It is doubtful that DER could have compelled PECO to clean up the Chester site on a common law public nuisance theory, since the common law, in contrast to the Clean Streams Law, imposed liability only on those whose conduct (even if without fault) had been a legal cause of the nuisance, and not simply on the basis of ownership of the offending land. *Compare* Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. 496, 509-510, 353 A.2d 471, 478-79 (1976), *aff'd*, 472 Pa. 115, 371 A.2d 461, *appeal dismissed*, 434 U.S. 807 (1977), *with* National Wood Preservers v. Commonwealth, 489 Pa. 221, 237-240, 414 A.2d 37, 45-47, *appeal dismissed*, 449 U.S. 803 (1980).

18. PECO's eleventh-hour attempt to add a claim against Hercules based on the Clean Streams Law was denied. Nonetheless, the jury was instructed as follows:

> There is a statute of Pennsylvania which provides it shall be unlawful for any person, and person includes corporations, or a municipality, to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from the property owned or occupied by such person or municipality, any substance of any kind or character resulting in pollution.
>
> Now, if you find there was a violation of this statute, you must find there was created a public nuisance as a matter of law.

This instruction, dealing with the public nuisance claim, cannot be construed as placing liability under the Clean Streams Law at issue. Though we need not reach the question, this instruction may have been so incomplete as to be prejudicial error.

19. Nor are DER's allegations, contained in its letters to PECO, *see* Part I *supra*, conclusive of the issue of liability under the Clean Streams Law.

of this record uphold the award of damages on PECO's indemnification theory.

Even if the record clearly supported the conclusion that PECO "could have been compelled" through legal action by DER pursuant to the Clean Streams Law to incur these expenses in cleaning up the condition created by PICCO, it is not at all clear that under Pennsylvania law Hercules is liable over to PECO for indemnity. "The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by law to an injured party." *Burbage v. Boiler Engineering & Supply Company*, 433 Pa. at 326, 249 A.2d at 567.

> The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence but rather on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligations owed by each of the wrongdoers to the injured person. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal obligation between the parties or arising from some positive rule of statutory or common law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

433 Pa. at 326-67, 249 A.2d at 567 (emphasis in original). There can be no indemnity as between parties that each bear primary responsibility for a wrong, regardless of their relative degrees of fault. Here we have the converse situation. Both PECO and Hercules are liable for the condition of the Chester site, if at all, vicariously -- PECO as the successor to PICCO in title to the land, Hercules as the successor to

PICCO's other assets. We have found no Pennsylvania case determining where the risk of loss falls in such circumstances. At least one court has held that there can be no common law indemnification as between two parties whose liability is vicarious. *See Liberty Mutual Insurance Company v. Curtis Noll Corporation*, 112 Mich. App. 182, 315 N.W.2d 890 (1982) (two "product-line" successors to company that manufactured defective product). Arguably, the liability of a party that has constructively merged with a polluter is of a character or kind different from that of a party who succeeded to title in the offending land. We need not, however, attempt to ascertain what general rule the Supreme Court of Pennsylvania would adopt. "Indemnity turns upon what is equitable and fair in measuring the comparative responsibilities of these defendants, should both be held liable." *District of Columbia v. Nordstrom*, 327 F.2d 863, 867 (D.C. Cir. 1963); *see also United States v. Savage Truck Line*, 209 F.2d 442, 447 (4th Cir. 1953) ("[T]he inquiry is always whether the difference in the gravity of the faults of the participants is so great as to throw the whole loss upon one."), *cert. denied*, 347 U.S. 952 (1954). In the special circumstances of this case -- where the Chester site had been sold by PICCO well before the acquisition of PICCO's other assets by Hercules, and where PECO had an opportunity to protect itself through inspection and negotiation -- neither considerations of equity nor considerations of which party was best situated to prevent the pollution of the Delaware River waters compel the conclusion that the entire loss ought to be shifted from PECO to Hercules. Indeed, essentially the same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss to Hercules on an indemnity theory. We conclude that the judgment of the district court

cannot be affirmed, insofar as it assessed damages, on a theory of common law indemnification.

We emphasize that our decision today should not be interpreted as standing for the general proposition that a party that contaminates land, or the successors to its assets, can escape liability by the expedient of selling the land. To the contrary, it would seem that there are many avenues by which such a party may be held accountable.[20] We hold only that in this case the purchaser of that land, PECO -- though we recognize that it acted as a responsible corporate citizen -- had no cause of action against the vendor's successor, Hercules, for private nuisance, public nuisance, or common law indemnity.

CONCLUSION

For the foregoing reasons, the injunction requiring Hercules to clean up the Chester site will be vacated, and the judgment of the district court on PECO's claims against Hercules will be reversed.

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20. For example, Hercules could be liable to neighboring landowners in private nuisance, or to users of Delaware River waters in public nuisance. DER or the federal Environmental Protection Agency may be able to proceed directly against Hercules on statutory or public nuisance theories.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INCORPORATED	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

MEMORANDUM OF DECISION

McGLYNN, *J.* February 22, 1984

In April of 1980 the Commonwealth of Pennsylvania, Department of Environmental Resources, (DER), discovered a hydrocarbon resinous material, which it deemed to be a pollutant, on property owned by Philadelphia Electric Company, (PECO), in Chester, Pennsylvania, (Chester Site). The DER required PECO to remove this resinous material from the property and the banks of the Delaware River.[1]

In February of 1982, PECO brought this suit claiming negligence, private nuisance and public nuisance against Hercules Incorporated, (Hercules), on the ground that Hercules' predecessor in interest, Pennsylvania Industrial Chemical Corporation, (PICCO), had caused the contamination during its operation of a petrochemical plant at the Chester Site in the period from 1945 to 1971. Since PICCO had sold the property to Gould, Inc., (Gould), in 1971, who thereafter sold to PECO in 1974, PECO's complaint also included claims of nuisance, deceit and/or misrepresentation against Gould, on the ground that Gould contributed to the contamination and/or knew of the contamination but did not

1. DER issued a citation against PECO on August 22, 1980 for violations of the Clean Streams Law. Pa. Stat. Ann. tit. 35, §691.01 et seq.

disclose this condition when it sold the property to PECO in 1974. [2] Both Hercules and Gould denied the claims of PECO and cross-claimed against each other. Jurisdiction of the case was based upon diversity of citizenship between the parties. See 28 U.S.C. § 1332 (West Supp. 1983). After a five day trial, the jury returned a verdict in favor of PECO[3] and in favor of Gould on the cross-claims.

Presently before the court are Hercules' motions for judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b), and, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59. Generally, a jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The court may not substitute its own judgment for that of the jury merely because the court may have reached a different conclusion. To grant a motion for judgment n.o.v., the court must find, as a matter of law, that the plaintiff failed to adduce sufficient facts to justify the verdict. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970).

However, a motion for a new trial, unlike a motion for a judgment n.o.v., does not seek a final judgment but another trial. Thus a motion for a new trial is within the sound discretion of the trial judge and should be granted only when the verdict is palpably contrary to the clear weight of the evidence or when a miscarriage of justice has occurred. *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 88-89 (3d Cir. 1960), *cert. denied*, 364 U.S. 835

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2. At trial, PECO presented no evidence against Gould, therefore at the close of PECO's case I granted Gould's motion for a directed verdict pursuant to Fed. R. Civ. P. 50(a).

3. Prior to trial the parties filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56 on the issue of corporate successor liability. I denied Hercules' motion and granted PECO's motion holding that Hercules was the successor in interest of PICCO.

(1960); J. Moore & J. Wicker, 6A *Moore's Federal Practice* ¶59.08 (2d ed. 1983). For the reasons set forth herein, Hercules' motions will be denied.

I. CORPORATE SUCCESSOR LIABILITY

Hercules' first argument is that the court erroneously denied its motion for summary judgment on the issue of corporate successor liability. The inquiry regarding corporate successor liability commences with Pennsylvania law, for it controls the outcome of this diversity suit. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

The general rule in Pennsylvania is that when one corporation merely sells or transfers all of its assets to a successor corporation, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets. *Husak v. Berkel Incorporated*, 234 Pa. Super. 452, 341 A.2d 174, 176 (1975). There are, however, certain exceptions to this rule. Liability for obligations of a selling corporation may be imposed on the purchasing corporation when: (1) the purchaser expressly or impliedly agrees to assume such obligation; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is fraudulently entered into to escape liability. *See Shane v. Hobam, Incorporated*, 332 F. Supp. 526, 527 (E.D. Pa. 1971). A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor. *See Lopata v. Bemis Co., Inc.*, 383 F.Supp. 342 (E.D. Pa. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98 (1970). Additionally, Pennsylvania has recently adopted a product-line exception. *Dawejko v. Jorgensen Steel Co.*,

290 Pa. Super. 15, 434 A.2d 106, 111 (1981); *Amader v. Pittsburgh Corning Corp.*, 546 F. Supp. 1033 (E.D. Pa. 1982).

In order to determine whether the sale of assets in this case falls within one of the six exceptions to the general rule of nonliability it will be necessary to examine the circumstances of the sale of PICCO assets. It is clear that if one of these exceptions apply, Hercules can be held liable for the acts of its predecessor in interest.[4] *Shane*, 332 F. Supp. at 527.

The contract of sale between Hercules and PICCO is entitled an Agreement and Plan of Reorganization (Agreement). After setting forth the warranties of the respective corporations, the Agreement provides in Article IV §4.1 that PICCO was to convey:

> all of its properties and assets of every kind and description as a going concern together with but not limited to cash, monies on deposit, goodwill, including the right to use of the name PICCO, customer lists, credit and sales records and all other interests to which it has any right by ownership, use or otherwise . . .
>
> . . . [in exchange for 240,000 shares of common stock of Hercules[5] and] . . .
>
> (ii) The assumption by Hercules of any and all obligations and liabilities of PICCO under the various agreements, contracts, leases, licenses and other

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4. Hercules' claim that PECO brought this action beyond the applicable statute of limitations is without merit since PECO sued Hercules, not its predecessor PICCO. *See Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Pa. Stat. Ann. tit. 15 §2111 (Purdon 1983).

5. As a result of a subsequent stock split by Hercules, PICCO received 480,000 shares of Hercules stock which was distributed to its shareholders.

writing referred to in Article I herein, including those specifically excepted from the representations in Article I; and

(iii) The assumption by Hercules of all the debts, obligations and liabilities of PICCO as of the Closing Date, excepting therefrom the liabilities arising out of the breach of any warranty of PICCO contained herein, in any certificate or other instrument furnished hereunder, any misrepresentation by PICCO herein, or the failure of PICCO to perform under any of its agreements and contracts herein, and except liabilities of PICCO set forth in subsection (iv) for which cash is specifically reserved herein.

In light of the exceptions to nonliability for a corporate purchaser of assets, the threshold question which this court must address is whether Hercules either expressly or impliedly assumed the instant liability when it entered into this contract with PICCO.

A buyer of assets can avoid the implied assumption of liabilities by enumerating liabilities assumed and explicitly excluding the assumption of liabilities not enumerated. *Klobendanz v. Joy Manufacturing Co.*, 288 F. Supp. 817, 822 (D. Col. 1968); *cf. Menacho v. Adamson United Co.*, 420 F. Supp. 128, 133 (D.N.J. 1976), *citing McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 563, 264 A.2d 98, 102 (Super Ct. 1970), *aff'd* 118 N.J. Super. 480, 288 A.2d 588 (Super Ct. App. Div. 1972). In the instant contract, however, Hercules broadly assumed all of PICCO's liabilities with certain limited exceptions. Therefore, unless one of the exceptions apply, Hercules can be held to have assumed the liability at issue.

Citing *Neville Chemical Co. v. Union Carbide Corporation*, 422 F.2d 1205 (3d Cir. 1970) and *Husak v. Berkel, Incorporated*, 234 Pa. Super. 452, 341 A.2d 174 (1975), Hercules maintains, however, that the law of

Pennsylvania supports the proposition that assumptions of liability are to be strictly construed in favor of nonliability. I do not agree.

In *Neville*, the plaintiff, a manufacturer of hydrocarbon resins, brought an action against the defendant, a petrochemical company, on the basis of negligence and breach of express and implied warranties for its failure to notify plaintiff of changes made in its process of manufacturing unsaturated oil for plaintiff, where such changes caused plaintiff's final product to give off an intolerable odor. Having concluded that there was sufficient evidence to uphold the jury's verdict that the defendant was negligent, the *Neville* court was faced with the question of whether the contract which the parties entered into insulated the defendant from liability for its *own* negligence.[6] *Id.* at 1216. (emphasis added). In finding that the contract clause did not exculpate the defendant from liability for its own negligence the *Neville* court held that while the general law of Pennsylvania is that a private party may validly contract to relieve

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6. The pertinent language of the *Neville* contract provides:
Paragraph 7

> Failure of Buyer to give notice of any claim with respect to any material delivered hereunder within fifteen (15) days after the receipt of such material shall be an unqualified acceptance of such material and a waiver by Buyer of all claims with respect thereto. Buyer assumes all risk and liability for the results obtained by the use of any material delivered hereunder in manufacturing processes of Buyer or in combination with other substances. No claim of any kind, whether as to material delivered or for nondelivery of material, shall be greater in amount than the purchase price of the material in respect of which such claim is made.

In the first sentence of Paragraph 9 of the contract, it is provided:

> This Agreement contains all of the representations and agreements between the parties hereto and no warranties shall be implied.

Neville, 422 F.2d at 1216.

himself from liability for the consequences of its own negligent acts, these contracts are not favored by the law and will be strictly construed with every doubt resolved against the party seeking their protection. *Id.* at 1221.

Likewise, Hercules' reliance on *Husak v. Berkel, Incorporated*, 234 Pa. Super. 452, 341 A.2d 174 (1975), is misplaced. In *Husak* the plaintiff brought suit against Berkel seeking damages for personal injuries he sustained from a defective food grinding machine which plaintiff alleged Berkel's predecessor company had manufactured. Berkel, in turn, joined SCM as an additional defendant claiming that SCM not Berkel had succeeded to the liabilities of the manufacturer of the defective food grinding machine. 341 A.2d at 176. SCM moved for summary judgment on the basis of corporate successor liability. The facts which were established with respect to this issue demonstrated that SCM was indeed the successor to the manufacturer of the defective machine. *Id.* Nonetheless, SCM argued that Berkel's predecessor had assumed the liability for the injury when it purchased the assets and liabilities of the division of the company which had manufactured the defective machine.[7] On the basis of these facts the lower court granted SCM's summary judgment motion. On appeal, the Superior Court of Pennsylvania determined that although SCM would ordinarily be held liable on these claims as the successor of the company which manufactured the machine the question was whether, in light of the contract clause, Berkel's predecessor had assumed the liability for

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7. The contract entered into between SCM's and Berkel's predecessors in interest which SCM claimed insulated it from liability for the disputed injury provided in pertinent part that:

> . . . [Berkel] . . . agrees to assume all liabilities, obligations, contracts, orders for the purchase of material and warranties of . . . SCM . . . made in connection with the manufacture and sale of products assigned hereunder to . . . Berkel . . . as part of the commercial and industrial line.

Husak, 341 A.2d at 177.

the instant injury. *Id.* at 177. In reversing the trial court's award of summary judgment, the court found that the disputed contractual clause lacked sufficient precision to meet the standards required to relieve SCM, as a matter of law, from liability for negligence or strict liability in connection with the production of a defective machine manufactured by its predecessor. *Id.* at 178.

In both *Neville* and *Husak* the court strictly construed a contract where one party to the contract sought to insulate itself from liability for its own negligent acts. This is not the situation before the court today, however, and therefore neither of these cases are controlling here. Thus the only question is whether one of the exceptions to Hercules' broad assumption of liability applies.

The gravamen of Hercules' claim of nonliability as the successor of PICCO is that PICCO breached its warranty regarding the accuracy of its financial statements when it failed to include the instant liability on its balance sheet at the time of closing. However, this liability was unknown at the time of sale and, therefore, could not have been reflected in any financial statement. Nonetheless, Hercules argues that its contract with PICCO was very clear in this regard and because the instant liability was not disclosed, it was not assumed.

Bouton v. Litton Industries, Inc., 423 F.2d 643 (3d Cir. 1970) is instructive on this issue. In *Bouton* the selling corporation, McKiernan-Terry, (M-T), entered into an agreement and plan of reorganization in September of 1962 with Litton Industries, Inc., (Litton), wherein Litton acquired all the assets, business and goodwill of M-T in exchange for Litton stock and the assumption by Litton of certain M-T liabilities. *Id.* at 645. Plaintiffs, trustees in liquidation M-T, brought a motion for summary judgment against Litton arguing that Litton was obligated, by contract, to assume the defense of certain actions brought against M-T and to pay any judgments arising therefrom. *Id.* at 646. The disputed action, which is pertinent to the instant case, involved two personal

injury claims which arose out of accidents allegedly caused by the failure of aircraft arresting engines made and sold by M-T in 1958. These claims occurred in 1963 and 1964 and were therefore unknown liabilities at the time of closing. *Id.* at 645.

On appeal from the district court's award of summary judgment in favor of the plaintiff, Litton argued that because the liabilities for the personal injuries were not reflected in M-T's balance sheet, M-T breached its warranty and thus Litton should not be held liable for the injuries. In affirming the district court's decision, the Court of Appeals dismissed Litton's argument stating:

> The only facet of the agreement to which Litton can point with even slight comfort in support of its contentions that it did not assume the obligation to insure against or pay the product liability claims is the absence of an express reference in the contract to such claims arising from future accidents. That absence is not significant. The draftsman throughout referred to broad categories of liabilities, not to narrow specifics.

Id.

Similarly, the court in *Bippus v. Norton Co.*, 437 F. Supp. 104 (E.D. Pa. 1977), when faced with cross-motions for summary judgment on the issue of corporate successor liability, found that the absence of a reference to a product liability claim in an agreement for acquisition was not a bar to holding the successor corporation liable for the injuries. *Id.* at 107. The *Bippus* court pointed to the broad categories of liabilities assumed and concluded that the absence of a specific reference to product liability was not significant. *Id.*

In the instant case the Hercules-PICCO contract provided for the broad assumption of liabilities with certain limited exceptions. As such, Hercules' claim that it did not assume the liability for environmental pollution

because it was not included in PICCO's balance sheet at closing is without merit and, accordingly, I conclude that successor liability can be imposed upon Hercules.

Moreoever, successor liability can be found on the additional ground that the sale of assets was a de facto merger.

As previously noted, the Hercules-PICCO agreement was entitled an Agreement and Plan of Reorganization. However, because of the complex nature of corporate reorganizations and acquisitions the intrinsic nature of a transaction cannot be ascertained merely from the form by which it is structured. It is the duty of the court to examine the substance of the transaction to ascertain its purpose and true intent. *Knapp v. North American Rockwell Corp.*, 506 F. 2d 361 (3d Cir. 1974) (Rosenn, J., concurring), *cert. denied* 421 U.S. 965 (1975).

In determining whether a particular transaction amounts to a de facto merger as distinguished from an ordinary purchase and sale of assets most courts look to the following factors:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

See e.g., Shannon v. Samuel Langston Company, 379 F. Supp. 797, 801 (W.D. Mich. 1974); *McKee v. Harris Seybold Co., Div. of Harris-Int. Corp.*, 109 N.J. Super. 555, 264 A.2d 98, 103-105, *aff'd*, 118 N.J. 480, 288 A.2d 585 (App. Div. 1972); *See also Knapp*, 506 F.2d at 365.

In *Knapp*, the plaintiff was injured in 1969 when his hand was caught in a machine that had been designed and manufactured by Textile Machine Works, (TMW) and sold to plaintiff's employer in 1966 or 1967. 506 F.2d at 361. In April of 1968, eighteen months prior to plaintiff's injuries, TMW entered into an agreement with North American Rockwell Corp., (Rockwell) whereby Rockwell acquired substantially all of the assets and liabilities of TMW in exchange for Rockwell stock. The agreement also stipulated that TMW was to dissolve as soon as possible. *Id.* at 363. Knapp brought his action against Rockwell in 1971 alleging his injuries resulted from the negligence of TMW in designing and manufacturing the machine and that Rockwell, as TMW's successor, was liable for such injuries. The transaction between TMW and Rockwell was characterized as a sale of assets. *Id.* at 361.

In reversing the district court's award of summary judgment in favor of Rockwell, the Court of Appeals held that, for the purposes of determining liability for tortiously injured parties, the Rockwell-TMW transaction should be treated as a de factor merger thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to the transaction. *Id.* at 367.

While cognizant of the general rule of nonliability for a corporation which merely purchases another's assets, the *Knapp* court nevertheless looked beyond the form of

the transaction. In doing so the court enumerated several factors as indicia of a de factor merger: the exchange of substantially all of TMW's assets and liabilities for Rockwell stock; the nominal amount of cash which Rockwell left with TMW to cover the expenses of the transfer with the proviso that any funds remaining after dissolution was to be returned to Rockwell; and finally, the requirement that TMW was to distribute the Rockwell stock to its shareholders and dissolve as soon as practicable. *Id.* at 363.

The factors which the *Knapp* court focused on in imposing liability on the successor corporation are likewise present here. The Hercules-PICCO agreement provided that Hercules was to acquire all the assets and substantially all of the liabilities of PICCO in exchange for Hercules stock; PICCO was to use its best efforts to keep its business organization intact, to keep available to Hercules the service of its present employees and to maintain its relationship with its customers and suppliers for Hercules' benefit; PICCO's management and personnel became a part of Hercules; PICCO was required, to the extent permitted by law, to transfer to Hercules the right to use its corporate name; PICCO was left with a nominal amount of money to dispose of its expenses in connection with the transaction and any money remaining was to be returned to Hercules; PICCO was required to dissolve as soon as practicable; and finally, following closing, Hercules continued to operate the PICCO plants, produce the same PICCO products and represented to PICCO's customers that PICCO resins had become a part of Hercules' Organics Department.[8]

Despite the factual similarity between *Knapp* and the instant case Hercules argues, relying on *Terry v. Penn Central Corp.*, 527 F. Supp. 118, *aff'd* 668 F.2d

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8. *See* Summary Judgment Motion Exhibits P-D, P-E, P-F, & P-J.

188 (3d Cir. 1981), that Pennsylvania has rarely invoked the de facto merger doctrine. Hercules' reliance on *Terry* is misplaced.

In *Terry* the plaintiff shareholders sought to enjoin defendant, Penn Central, through a subsidiary, from proceeding with an acquisition of defendant, Colt Industries, unless and until the plaintiffs were afforded the right to dissent and vote. *Id.* at 120. Plaintiffs claimed that the acquisition amounted to a de facto merger. *Id.* at 132. Faced with the issue of the rights of dissenting shareholders, Judge Pollak refused to apply the de facto merger exception in light of legislative changes which restricted the availability of that doctrine in dissenting shareholder cases. *Id.* at 133. However, in reaching this conclusion, Judge Pollak pointed out the obvious distinction:

> The question in . . . [*Knapp*] . . . was one of essentially the survivorship of tort liability and one would certainly hope that courts would look to that issue in an entirely different way from the analysis that goes to determining the rights of shareholders to dissent and to vote.

Id. at 134.

After a careful examination of the substance of the transaction between Hercules and PICCO, it was my conclusion that not only did Hercules assume the liabilities of PICCO but also that the Hercules-PICCO transaction constituted a de facto merger. Therefore, Hercules' motion for summary judgment on this issue was denied and PECO's motion was granted.

II. NUISANCE CLAIMS

Hercules' second contention in support of its motion for judgment n.o.v. and/or in the alternative for a new trial is that, as a matter of law, PECO is not entitled to nuisance damages.

The essence of a nuisance is an interference with the use and enjoyment of land. W. Prosser, *Handbook of the Law of Torts*, §89, at 591 (4th ed. 1971). As a general rule, one who creates a nuisance is liable for the resulting damages and ordinarily his liability continues for as long as the nuisance continues. *Smith v. Elliot*, 9 Pa. 345 (1848); *Ryan v. Commonwealth Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1977); *See New Jersey Dept. of Environmental Protection v. Exxon Corp.*, 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977).

Relying on *Bouy v. Fidelity-Phila. Trust Co.*, 338 Pa. 5, 12 A.2d 7 (1940), Hercules' first argument is that PECO is not entitled to relief because the injury sustained was not transmitted beyond the land where the objectionable condition existed.

The reliance on *Bouy* is misplaced. In the first place, Bouy was bottomed on *Harris v. Lewistown*, 326 Pa. 150, 191 A. 37 (1937) which was expressly overruled by *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1969). Secondly, unlike the physical injury problem faced by the court in *Bouy* this case involves pollution, the effects of which were transmitted "beyond the boundaries of the land upon which the objectionable condition exists." *Bouy*, 338 Pa. at 8.

The Clean Streams Law (Pa. Stat. Ann. tit. 35, §691.1 et seq, Purdon 1977) expands the law of nuisance in the area of environmental pollution to impose liability on an owner or occupier of land for pollution which exists on his land irrespective of who was responsible for creating it. *National Wood Preservers, Inc. v. Commonwealth of Penna., Department of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980). In *Ryan v. Commonwealth, Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1975) the DER required a former lessee of a landfill to enter the land he previously leased in order to correct the nuisances which he

created during the lease. 373 A.2d at 476. Ryan challenged the authority of the DER to make him comply with the order because he was not presently the owner or occupier of the land. *Id.* at 477. Despite Ryan's non-proprietary status, the court found that the DER had the "express, unconditional authority to protect the health of the citizens of this Commonwealth by ordering the abatement of nuisances." *Id.*

Moreover, the Clean Streams Law is a codification of the common law of nuisance relating to streams and waterways. *Com. ex rel Shumaker v. New York & Pennsylvania Co.*, 367 Pa. 40, 79 A.2d 439, 444 (1951).

> "It is a principle of the common law, that the erection of anything in the upper part of a stream of water, which poisons, corrupts or renders it offensive and unwholesome, is actionable. And that principle not only stands with reason, but is supported by unquestionable authority ancient and modern.

Howell v. McCay, 3 Rawle 256 (1832). Thus, there can be no question that if there are pollutants on property which are contaminating the waterways, an action can be brought against the property owner to abate the nuisance.

Hercules, however, takes the position that the controlling principles are those set forth in *Restatment (Second) of Torts* §352 amd 353 (1965).[9] I do not agree.

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9. §352. Dangerous Conditions Existing at Time Vendor Transfers Possession.

Except as stated in §353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artifical, which existed at the time that the vendee took possession.

§353. Undisclosed Dangerous Conditions Known to Vendor

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artifical , which involves unreasonable risk to persons on the land, is subject to

Section 352 sets forth the general rule of nonliability of a vendor or transferor of land for physical harm suffered by a vendee or others due to a dangerous condition which existed on the land at the time of transfer. Section 353 carves out a narrow exception whereby the vendor will be subject to liability if he fails to disclose or conceals any condition which involves an unreasonable risk of harm to persons on the land. Neither section is applicable since they address a vendor's liability for physical harm to persons on the land whereas the instant case involves a claim for the costs of abating a nuisance. Thus §840A provides the rule:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to to liability for the continuation of the nuisance after he transfers the land.

Restatement of Torts (Second) §840A.

Hercules urges the court to ignore this section because it has not been expressly adopted by the courts of Pennsylvania. But neither has it been rejected and as a

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NOTES (*Continued*)

liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

general matter, the Pennsylvania courts have "not hesitated to adopt sections of the [Restatement] when [their] common law precedents varied from the Restatement or when the Pennsylvania common-law provide[s] no answer." *Gilbert v. Korvette, Inc.*, 457 Pa. 602, 611-612, n.25, 327 A.2d 94, 100 n.25 (1975). (citing cases). There is no question in my mind that when and if the Supreme Court of Pennsylvania is presented with the opportunity it would accept §840A as a statement of the rule in Pennsylvania. This is implicit in *Ryan v. Commonwealth, Dept. of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1975); *National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980).

Moreover, my conclusion that Hercules can be held accountable for the abatement of the nuisance which its predecessor created is supported by analogous cases in other jurisdictions. *See State v. Ole Olsen, Ltd.*, 352 N.Y.S. 2d 97 (1973) (offensive sewage disposal units in a number of housing developments created a nuisance for which builder can be responsible); *City of Jackson, Mississippi v. Filtrol Corp.*, 624 F.2d 1384, 1390 (5th Cir. 1980) (court permitted an easement holder to recover damages in nuisance against the owner of the property who had contaminated its subsoil with sulfuric acid.)

I have no difficulty in predicting that if the Supreme Court of Pennsylvania had this case before it, it would impose liability on Hercules for the nuisance which its predecessor created at the Chester site.

III. THE INJUNCTION

The most substantial of Hercules' post-verdict claims is that the court erred in ordering mandatory relief. In response to special interrogatories the jury found

that PICCO caused the contamination of the property [10] and that the contamination continues to pollute the groundwater and the Delaware River.[11] Based on these findings I entered the following order:

> . . . IT IS FURTHER ORDERED AND DECREED that Hercules, Inc. shall forthwith take all appropriate action to abate and eliminate the contamination on the property of the Philadelphia Electric Company located at the Chester Site and abate the further pollution of the ground water and the Delaware River adjacent to the property by collecting and removing all pollutants in accordance with all applicable rules and regulations of the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, and any other appropriate state or federal regulatory agency; . . .

Hercules makes three arguments with respect to the injunction: first, that this court lacked the authority to award the injunction; second, that there was insufficient evidence to warrant mandatory relief; and last, that it was substantially prejudiced because it proceeded to trial on the basis that injunctive relief was not an issue.

PECO's complaint alleged that Hercules' predecessor, PICCO, created a continuing nuisance on the

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10. The jury responded "yes" to special interrogatory #1 which asked

> "Do you find by a preponderance of the evidence that PICCO caused the contamination on the property now owned by Philadelphia Electric Company?

11. The jury responded "yes" to special interrogatory #2 which asked:

> "Do you find by a preponderence of the evidence that the contamination on the property now owned by Philadelphia Electric Compnay continues to pollute the ground water on the Delaware River."

Chester Site, *See* Paragraphs 8, 10, 17, 22 and 23 of Complaint, and it supported this claim by evidence showing as follows: PICCO, Hercules, predecessor was a resin manufacturing plant; during PICCO's operation of the Chester Site it dumped resins into a lagoon on the property to neutralize their acidic quality; a DER representative visited the Chester Site and found a resinous material in the lagoon and oozing from the banks of the property into the Delaware River; samples taken from the property turned out to be hydrocarbon resins which compared favorably to resins identified as PICCO materials; this hydrocarbon resinous material was in the groundwater under the property and leaching from the banks of the property into the Delaware River; and lastly, this material is presently oozing from the surface of the property.

Hercules offered evidence that Gould, not its predecessor PICCO, created the nuisance on the land but the jury, rejected this version of the facts and found in favor of PECO. There was ample evidence to support the jury's determination and I can find no basis upon which to overturn that finding.

The jury's determination that the contamination on the Chester Site continues to pollute the groundwater and the Delaware River is grounds for injunctive relief. It has long been the rule in Pennsylvania that once a continuing nuisance is established, an injunction is an appropriate remedy. *Krocker v. Westmoreland Mill Co.*, 274 Pa. 143, 117 A. 669 (1922); *Keppel v. Lehigh Coal and Navigation Co.*, 200 Pa. 649, 50 A. 302 (1901); *Steward v. Foltz's Appeal*, 56 Pa. 413 (1867); *Bradley v. Valicenti*, 185 Pa. Super. 403, 138 A.2d 238 (1958).

Hercules' bald assertion that it has been substantially prejudiced by the granting of an injunction finds little substance in the record.

The Complaint stated a claim for a continuing nuisance and in addition to damages, the prayer requested "such other and further relief as may be just." This was

clearly sufficient to put defendant on notice particularly in light of the fact that the only practical way to abate a continuing nuisance is by mandatory relief. Moreover, Fed. R.Civ.P. 54(c) provides, in part, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" (emphasis added). Also, it should be noted that plaintiff's pretrial memorandum filed eleven days before the commencement of trial specifically requested injunctive relief. Hercules neither objected nor moved to strike this demand.

Finally, if Hercules believed that relief from a continuing nuisance was not an issue in the case, it certainly would have objected to Interrogatory #2 (See Footnote 11, supra) as irrelevant and immaterial, but it did not. Hercules' argument that injunctive relief was not an issue because I denied PECO's motion on the eve of trial to amend that Complaint to assert a claim under the Clean Streams Law is without merit. That statute expressly provides that actions under the Clean Streams Law are not to be construed as the exclusive remedy for abating nuisances. Pa. Stat. Ann. tit. 35 § 691.701 (Purdon 1977).

Hercules' also maintains that the teaching of *United States v. 47 Bottles More or Less, Etc.*, 320 F. 2d 564 (3d Cir. 1963), precludes the granting of an injunction under the circumstances presented here. I do not agree.

47 Bottles involved a condemnation proceeding under the Federal Food, Drug and Cosmetic Act wherein the govenment was permitted to amend its complaint to add a prayer for injunctive relief at the conclusion of the trial. *Id.* at 567. In reversing the award of injunctive relief the court held that the trial judge abused his discretion in permitting the injection of a new and different prayer for relief at the terminal stage of the case after the evidence had been closed and the court had made its findings. *Id.* at 573.

Such is not the case here. Hercules had ample notice before trial of the plaintiff's demands. Significantly, the court in *47 Bottles* distinguished *United States v. 184 Barrels of Dried Whole Eggs*, 53 F. Supp. 652 (E.D. Wis. 1943) by pointing out that there the amendment requesting injunctive relief was made "at an early stage of the trial." 320 F.2d at 574.

Hercules' remaining contentions find no support in the record and therefore will not be discussed. Hercules' motion for judgment n.o.v. and/or in the alternative, for a new trial are therefore denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INCORPORATED	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

ORDER

AND NOW, this 22nd day of FEBRUARY, 1984, upon consideration of the Motion for Judgment Notwithstanding the Verdict and/or for a New Trial filed on behalf of Hercules, Incorporated, it is hereby

ORDERED that the motion be and the same is hereby DENIED

BY THE COURT:

JOSEPH L. McGLYNN, JR. *J.*

A-55

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1159

PHILADELPHIA ELECTRIC COMPANY

v.

HERCULES, INC.

and

GOULD, INC.,

Hercules, Inc., Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and McCUNE, *District Judge**

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* Honorable Barron P. McCune, United States District Court for the Western District of Pennsylvania, sitting by designation.

The petition for rehearing filed by Petitioner-Appellee, Philadelphia Electric Company, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____

Circuit Judge

Dated: June 21, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
HERCULES, INC.	:	
	:	
and	:	
	:	
GOULD, INC.	:	NO. 82-0690

SPECIAL INTERROGATORIES

1. Do you find by a preponderence of the evidence that PICCO caused the contamination of the property now owned by Philadelphia Electric Company?

   Yes X No ____

   If your answer is no, do not answer any other questions. If your answer is yes, go on to the next question.

2. Do you find by a preponderance of the evidence that the contamination on the property now owned by Philadelphia Electric Company continues to pollute the groundwater or the Delaware River.

   Yes X No ____

3. In what amount do you award damages?

   $345,906.69

4. Do you find by a preponderance of the evidence that ABM's activities contributed to the contamination of the Philadelphia Electric Company property?

   Yes X No ____

5. Was Gould aware of ABM's activities and permitted them to continue?

Yes X No ____

6. If your answer is Yes, by what percentage did ABM's activities contribute to the total contamination?

Hercules	%
ABM	%
	100%